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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of *Ex Parte* Communication
CS Docket No. 98-120

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the FCC rules, this letter reports that on July 1, 2003, the undersigned met with William H. Johnson, Deputy Bureau Chief, Media Bureau; Eloise Gore, Assistant Division Chief, Policy Division, Media Bureau; Ronald Parver, Assistant Division Chief, Policy Division, Media Bureau; and Ben Bartolome, attorney, Media Bureau, to discuss the issue of digital multicast must-carry for television stations. The enclosed handouts were distributed at the meeting.

As required by section 1.1206(b), two copies of this letter are being submitted.

Very truly yours,

William L. Watson,
Vice President

Enclosures
cc (w/o encl.):
William H. Johnson, Esquire
Eloise Gore, Esquire
Ronald Parver, Esquire
Ben Bartolome, Esquire
John R. Feore, Jr., Esquire
M. Anne Swanson, Esquire

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THE PAX TV FULL DIGITAL MULTICAST MUST-CARRY PROPOSAL

Summary

I. The Commission adopted its single basic tier approach for rate regulation purposes, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5744-45 (1993), and acknowledged that the *ACLU* court's interpretation of "basic cable service" as including all tiers offering broadcast programs, *ACLU v. FCC*, 823 F.2d 1554, 1565-66 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 959 (1988), "may continue to apply for other purposes." 8 FCC Rcd at 5745 n.454. Section 614(b)(4)(B) of the Communications Act gives the Commission flexibility to devise new technical rules for digital carriage when necessary. 47 U.S.C. § 534(b)(4)(B). Therefore, the Commission may require carriage of digital *primary video* on the primary basic service tier and *multicast* digital programming on another basic tier that is not subject to the Section 614(b)(7) requirement that must-carry signals be provided to all subscribers.

II. As noted, Section 614(b)(4)(B) allows the Commission to modify its signal availability standards in a digital world. Moreover, Section 614(b)(3)(B) requires cable operators to carry broadcasters' entire program schedule except as specifically excluded under the Commission's syndex and network non-duplication rules. 47 U.S.C. § 534(b)(3)(B). The Commission, therefore, should require the carriage of broadcasters' full program schedule, including multicast programs broadcast in a digital mode.

I. The FCC Has the Statutory Authority and Discretion To Allow More Than One Basic Service Tier.

A. Section 623(b)(7) of the Communications Act, codified at 47 U.S.C. § 543(b)(7), provides as follows:

> Components of basic tier subject to rate regulation
>
> (A) Minimum contents
>
> Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:
>
> (i) All signals carried in fulfillment of the requirements of sections 614 and 615 of this title.
>
> (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

B. The broad definition and legislative history of the definition of "basic cable service" in Section 602(3) of the Communications Act, formerly 602(2), now codified at 47 U.S.C. § 522(3), clearly permit allowance of more than one basic service tier.

1. By its terms, the definition of "basic cable service" specifically contemplates more than one basic tier as Section 602(3) states:

(3) the term "basic cable service" means any service tier which includes the transmission of local television broadcast signals.

2. The House Committee on Energy and Commerce Report on the Cable Communications Policy Act of 1984 (the "1984 Act") repeatedly contemplates more than one basic tier.

a. Although drafted by the House Committee, this report was adopted by both the House and Senate as their explanation of the 1984 Act. (*See* 130 CONG. REC. S14, 285 (daily ed. Oct. 11, 1984); 130 CONG. REC. H12, 245 (daily ed. Oct. 11, 1984).)

b. In discussing the definition of "basic cable service" and the new rate regulation provisions, the House Report acknowledges the possibility of multiple basic tiers in several places:

> The Committee recognizes that some cable franchises include several tiers of cable service, each of which meet the definition specified in the bill. One or more of those tiers may contain only the retransmission of local broadcast signals; another tier may include, either directly or by specific reference in the franchise incorporating a lower price tier, the local television broadcast signals together with other video programming or other programming services. The Committee intends that all service tiers that meet the definition will be considered as basic cable service. In some franchises this will mean that basic cable service includes multiple service tiers.

H.R. REP. NO. 98-934, at 40 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4677.

> Under Subsection 623(c), a franchise authority may, where a franchise has been granted on or before the effective date of the Act, to the extent provided in a franchise and consistent with state law in effect on that date, regulate the rates for basic cable service, including multiple tiers of basic cable service.

Id. at 4703.

C. *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), which addressed challenges to the Commission's regulations implementing the 1984 Act, specifically reversed an FCC definition of "basic cable service" that contemplated only a single tier.

1. "[B]ecause there is no ambiguity on the face of the statute, we believe that the definition of 'basic cable service' established by Congress in Section 602(2) should apply in all circumstances." 823 F.2d at 1569 (footnote omitted).

2. *ACLU v. FCC* is still good law and permits the FCC to allow more than one basic tier in the DTV must-carry context.

D. Subsequent FCC pronouncements regarding the existence of only one single basic service tier were premised on and limited to a bifurcated rate regulation scheme that no longer exists.

1. In adopting regulations to implement the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"), the FCC concluded that the Act contemplated that each cable operator must offer only one basic tier. *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 5631, 5744-45 (1993) (the "*1993 R&O*"). In reaching this decision, the FCC agreed with commenting cable parties who said *ACLU v. FCC* did not apply, particularly because language added to Section 623 by the 1992 Act in several other places in order to implement the 1992 Act's new bifurcated rate regulation scheme made reference to a single basic tier. *Id.* at 5745.

2. On appeal, the D.C. Circuit, after discussing the definition of "basic cable service" in Section 602(3) and the *ACLU v. FCC* decision, found the FCC's latest interpretation of Section 623(b)(7) as requiring one "basic service tier" to be a "permissible" interpretation of the 1992 Act. *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 199 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996). The court agreed with the FCC that the 1992 Act, by repeatedly referring to the basic tier in the singular, contemplated one basic tier. The court said the definition of "basic cable service" in Section 602(3) and the requirement of a single basic tier could be reconciled in light of the new bifurcated rate regulation scheme put in place by the 1992 Act. Prior to 1992, the Communications Act had authorized regulation of only basic cable service. The

new rate regulation scheme put in place by the 1992 Act, however, centered not around "basic cable service," but around the "basic service tier" and the "cable programming tier." The 1992 Act established a regime in which local franchising authorities generally have jurisdiction to implement the rate rules only for the basic service tier while the Commission is solely responsible for cable programming service tiers. *Id.*, *citing* § 543(a)(2).

3. The bifurcated rate scheme, upon which the Commission relied in deciding to limit cable operators to a single basic service tier, no longer exists. The Telecommunications Act of 1996 provided for a sunset of all rate regulation of the cable programming service tier on March 31, 1999. 47 U.S.C. § 543(c)(4).

E. Even under the 1992 Act's bifurcated regime, however, the FCC specifically recognized that the 1984 Act's definition may continue to apply for other purposes. *1993 R&O*, 8 FCC Rcd at 5745 n.454. Advancing the DTV transition by allowing digital multicast must-carry clearly qualifies as a justifiable alternative purpose.

II. Both the Statutory Must-Carry Provisions and the FCC's Mandate To Advance the DTV Transition Allow the FCC To Rule That Carriage of Either a Station's Analog Signal or Provision of Its Downconverted Digital Signal on the Analog Tier Is Sufficient To Satisfy the Signal Availability Requirement of Section 614(b)(7).

A. Section 614(b)(7) of the Communications Act, codified at 47 U.S.C. § 534(b)(7), provides as follows:

> Signal Availability. – Signals carried in fulfillment of the requirements of this Section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3) of this title.

B. Congress has specifically deferred to the FCC to adopt the technical requirements to implement DTV must-carry.

1. The 1992 Act made this clear in adopting Section 614(b)(4)(B), codified at 47 U.S.C. § 534(b)(4)(B).

a. Section 614(b)(4)(B) provides as follows:

(B) Advanced Television.

> At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

2. The Conference Report that accompanies the 1992 Act explained that it was empowering the FCC to make such changes as might be needed in the future "to ensure that cable systems will carry television signals complying with such modified [digital] standards in accordance with the objectives of this [mandatory signal carriage] section." H.R. CONF. REP. NO. 102-862, at 67, (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1249.

3. The Conferees minced no words in explaining that the objective of the must-carry section was to ensure carriage of broadcast signals, no matter whether analog or digital:

> The conferees find that the must-carry . . . provisions in the bill are the only means to protect the federal system of television allocations, and to promote competition in local markets. Other remedies . . . will not protect these interests. Such post hoc approaches permit significant economic harm to occur before relief is granted. By then it is simply too late . . . [A]n affirmative must-carry requirement is the only effective mechanism to promote the overall public interest."

Id. at 75, *reprinted in* 1992 U.S.C.C.A.N. at 1257.

4. Congress's broad empowerment of the Commission and deferral to the agency in the establishment of DTV must-carry standards signaled that Congress did not necessarily consider existing provisions like Section 614(b)(7) governing analog must-carry to apply in a digital world.

C. The FCC has the discretion to find that carriage of a station's analog or its downconverted digital signal and its provision to all subscribers on an analog tier is sufficient to satisfy Section 614(b)(7).

1. In resolving this issue of mandatory carriage for digital-only television stations, the Commission already has held that single channel DTV broadcasters must be given must-carry rights and are entitled to elect whether they prefer to have their signal carried on an analog or digital tier. *WHDT-DT, Channel 59, Stuart, Florida, Memorandum Opinion and Order*, 16 FCC Rcd 2692, 2699-700 (2001). In allowing the election, the Commission did not indicate that it found Section 614(b)(7) an insurmountable impediment to the result.

2. The Commission also has held that cable operators are not required to provide viewers with set-top boxes capable of converting DTV signals for viewing on analog television sets. *Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2632-33 (2001). Thus, the Commission already has decided that Section 614(b)(7) does not require cable operators to provide the equipment necessary to allow viewers to receive all DTV must-carry signals.

3. It would be inconsistent with these recent decisions for the Commission to act in a manner that prohibited implementation of the PAX TV Proposal.

THE PAX DIGITAL MUST CARRY PROPOSAL

1. Television stations may elect to have their analog signals removed from the cable systems and replaced with their digital signals before the end of the digital transition. For the carriage of digital signals, the main programming would be downconverted by the cable operator to analog and carried on the analog portion of the cable system on the same channel as the analog signal was carried. The remaining free multicast programming portion of the station's digital signal would be carried on the digital portion of the cable system served by the set-top digital boxes and would be used to deliver additional channels of free programming services only, compressed by cable operators into 3 or less MHz. All broadcast station signals should be contiguous to each other.

2. The station's primary digital signal when downconverted to the analog portion of the cable system will utilize 6 MHz of cable analog capacity. The remaining portion of the station's digital signal would be placed on the digital tier of the cable system and would require no more than 3 MHz of cable digital capacity. When a cable operator's digital set-top box penetration reaches 95% of its subscribers, the system could carry all of the broadcast station's signals on the digital tier only. Thus, a DTV station would only require, in the future, 3 or less MHz of a cable operator's digital capacity.

3. This digital must carry election would be applicable to cable systems with 750 MHz of capacity provided that the systems have installed digital head-ends and have digital set-top boxes. The downconverted digital signal (carried on the analog portion of the system) and the multicast digital signals (carried on the digital portion of the system) would be provided as part of the basic cable services provided to all analog cable subscribers and (for the multicast signals) to all basic subscribers with digital boxes. Thus, as digital set-top boxes are deployed by the cable operator, full digital must carry would occur.

4. This digital must carry option would be available on a first-come, first-served basis within the Communication Act's existing 33% cap on the use of cable systems activated channels for must carry purposes. A 750 MHz cable system is required by the 1992 Cable Act

to devote 250 MHz to local television signals. Under the PAX Digital Proposal, such cable system operating even in a market with 20 television stations would devote 120 MHz for the analog portion of the system and another 3 MHz per station (20 x 3 = 60 MHz) on the digital tier for a total of 180 MHz – far below what the 1992 Cable Act requires be devoted to the carriage of such signals. The average market with 10 television stations would require only 90 MHz of a cable system's spectrum leaving 160 MHz, set aside by the FCC for broadcasters, to revert to cable for its own use.

5. All other aspects of the 1992 Cable Act, as it relates to must carry, would apply. Congress directed the FCC only to establish whatever technical changes are necessary in the carriage provisions of the 1992 Cable Act to ensure full cable carriage of broadcasters digital signals. Everything else the FCC has attempted to change in the must carry requests goes beyond this Congressional mandate. The PAX Digital Must Carry Proposal accomplishes what Congress intended and is faithful to the 1992 Cable Act as implemented by the FCC.